

No. 15007.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BENMATT ORGANIZATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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I.

Appellee's Brief Totally Fails to Comprehend and Apply the Well Established Rule of Statutory Construction, Commonly Known as the "Ejusdem Generis" Rule, That Is, That General Words in a Statute Will Be Considered as Including Only Articles of the Same Kind, Class, Character or Nature as Those Specifically Enumerated in the Statute.

Appellant's Opening Brief pointed out that Section 3403(c) specifically enumerated six articles, which shall be considered "parts or accessories", namely, "spark plugs, storage batteries, leaf springs, coils, timers and tire chains"; that these six named articles were deliberately placed in the statute as a guide in defining the generic

term "parts or accessories"; that each named article served an operational and functional need on an automobile and each is related to the machine's utility; and that Treasury Regulation 46, Section 316.55, repeats the same six named articles referred to in Section 3403(c), *supra*, thereby adopting the expressed classification set out in the statute. In the present case, there is no similarity between automobile dealer frames and any one of the articles specifically enumerated in Section 3403(c) and Treasury Regulation 46, Section 316.55, nor can such frames be considered as being in the *same class or kind of articles* as any of those enumerated in said section.

Obviously, the rule of "ejusdem generis" is applicable in the present case and this rule has been consistently applied in construing provisions of the Internal Revenue Code imposing excise taxes.

A scholarly presentation of this rule is found in *Geer v. Birmingham* (D. C. Iowa, 1950), 88 Fed. Supp. 189, 224. This was a suit against the Collector to recover cabaret taxes. The District Court held that a ballroom which made an admission charge, and in connection therewith furnished lounge space serving 17½% of the capacity of its dance floor, and which operated a fountain which sold tobacco, soft drinks and confections at retail prices, but no meals, was not a roof garden, cabaret or other similar place, and hence was not subject to the Federal cabaret tax.

District Judge Graven, in the course of his opinion, stated:

“It would therefore seem necessary in the present case to consider the applicability to the statute and regulations in question of the rule commonly known as the ‘ejusdem generis’ rule, *i. e.*, ‘of the same kind, class or nature.’ *That rule is to the effect that where in a statute general words follow a designation of particular subjects the meaning of the general words will ordinarily be presumed to be restricted by the words of particular designation. The general words will be regarded as including only things of the same kind, class, character or nature as those specifically enumerated and such words will not be given the wide and comprehensive signification that they would be given if they stood alone.* 50 Am. Jur. pp. 244, 245; 28 C. J. S., pages 1049-1050. The rule has been applied in construing provisions of the Internal Revenue Code imposing excise taxes. *White, Collector v. Aronson*, 1937, 302 U. S. 16, 20, 58 S. Ct. 95, 82 L. Ed. 20; *United States v. Phez Co.*, 9 Cir., 1928, 28 F. 2d 106, 107; *Feitler v. Harrison*, 7 Cir., 1942, 126 F. 2d 449, 451. *In all three of the above-cited cases it was held that the particular designation in the statute of the articles subject to the excise tax followed by general words of designation brought into the list of taxables only those articles which were similar to those particularly named and with which they were closely associated.* The rule of ‘ejusdem generis’ is to be used as an aid in ascertaining the true intention of a statute and not to thwart it. *United States v. Gilliland*, 1941, 312 U. S. 86, 93, 61 S. Ct. 518, 85 L. Ed. 598. The rule serves to prevent general words from extending their operations into a field not intended. *Phillips v. Houston Nat. Bank*, 5 Cir., 1940, 108 F. 2d 934, 936. The

rule of ejusdem generis is the specific application of the broader rule known as 'noscitur a sociis', *i. e.*, 'it is known from its associates'. See *Eastman v. Armstrong-Byrd Music Co.*, 8 Cir., 1914, 212 F. 662, 667, 52 L. R. A. N. S. 108. That rule is also sometimes referred to as the rule that, 'words are known by the company they keep'. The rule of *noscitur a sociis* is to the effect that the meaning of doubtful words may be ascertained by reference to the meanings of words associated with them." (Emphasis supplied.)

Clearly, therefore, the six articles enumerated in Section 3403(c) and Treasury Regulation 46, Section 316.55, express the intent and purpose of the statute and the regulations to impose a tax *only* on such articles as are of the "same kind, class or nature" as those specifically enumerated therein.

In *White v. Aronson* (1937), 302 U. S. 16, 20, the Supreme Court affirmed this rule of statutory construction. The question was whether jig-saw picture puzzles were games and the Court held that they were not. The Court stated at page 21:

"The Circuit Court of Appeals rightly concluded that the words 'games and parts of games' bring into the list of taxables only such other articles as are used in games of contest, *the same as those particularly named there and with which they are closely associated.*" (Emphasis supplied.)

II.

Appellee Has Misconceived the Rule in *Universal Battery Co. v. United States* (1930), 281 U. S. 580, and Misapplied It to the Factual Situation in the Present Case.

The rule in *Universal Battery Co. v. United States*, *supra*, must be construed in relation to its particular facts. The articles involved were *storage batteries, gascolators, parts to speedometers and brackets and fittings for use as replacement parts for bumpers on automobiles*. Each article above named is specifically integrated to the operational and functional needs of an automobile and to its use and utility. Each article is of the "same kind, class or nature" comprehended by Section 3403(c) and Treasury Regulation 46, Section 316.55. (*Geer v. Birmingham*, *supra*; *United States v. Phez Co.* (C. A. 9th, 1928), 28 F. 2d 106, 107.)

In interpreting and applying the rule in *Universal Battery Co.*, *supra*, appellee seems to overlook that the general language of opinions must be read in connection with the facts. Generalizations are apt to mislead if one fails to remember that "General propositions do not decide concrete cases." (*Holmes, J.*, dissenting in *Lochner v. New York* (1905), 198 U. S. 45, 76.)

Appellee, hence, is proceeding on a mistaken theory and is reaching an exactly opposite conclusion from what the rule announced in the *Universal Battery* case actually and judicially means. The Supreme Court, following its comments on the regulations in that case, stated the rule applicable to "parts or accessories":

"It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been

some other use for the articles for which they are not so well adapted. It remains to apply that view to the case in hand."

Based on the specific articles enumerated in the *Universal Battery* case, the Court distilled and stated the rule to be applied in defining "parts or accessories." The Court bottomed the rule on articles *primarily adapted* for use on motor vehicles. The factors urged by appellee were deliberately omitted in the Supreme Court's phrasing of the rule. Nothing is said in the rule about "ornamentation". *Primarily adapted* must be construed in relation to and necessarily confined to the class of articles involved in the *Universal Battery* case, namely, *storage batteries, gascolators, parts to speedometers, and brackets and fittings for use as replacement parts for bumpers on automobiles*. Each such article is basically integrated to the operational and functional needs of an automobile. Each article is within *the class of articles* comprehended and enumerated by Section 3403(c) and Treasury Regulation 46, Section 316.55, paragraph (c). (App. Op. Br., App. p. 3.) It would seem that appellee's super-technical and attenuated argument *re* "accessories, vis-a-vis; parts" (Br. pp. 16-17) cannot be reconciled with the above interpretation of the rule in the *Universal Battery* case.

In *White v. Aronson, supra*, the Supreme Court in further negation of appellee's argument, said:

"Of course, the general language of opinions must be read in connection with the facts."

Appellee has not observed this cardinal principle in interpreting the rule announced in the *Universal Battery* case.

Finally, in *White v. Aronson*, *supra*, the Supreme Court, in a similar factual situation, said:

“Where there is a reasonable doubt as to the meaning of a taxing act, it should be construed most favorably to the taxpayer. *Gould v. Gould*, 245 U. S. 151, 62 L. Ed. 211, 28 S. Ct. 53: ‘Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them. *Philadelphia Storage Battery Co. v. Lederer*, D. C. 21 F. 2d 320, 321, 322.’” (See App. Op. Br., Point V.)

III.

Appellee’s Attempt to Distinguish *Smith v. McDonald* (C. A. 3d 1954), 214 F. 2d 920, and *Cuno Engineering Corp. v. United States* (1930), 43 F. 2d 259, Is Not Convincing.

Appellee argues, in commenting on *Smith v. McDonald*, *supra*, that the “* * * Third Circuit’s preoccupation with the 1941 Amendment to Section 316.55 of Treasury Regulation 46” relating to fare registers and fare boxes, caused it “erroneously” to hold that “taxi signs were not accessories”. Appellee then goes on to say: “However, since the result reached was to hold attached taxi signs not to be ‘accessories’, it should not here be followed by a precedent.” The net effect of appellee’s argument is that *Smith v. McDonald*, *supra*, should be overruled. Appellant’s view that *Smith v. McDonald* case is applicable here, is further fortified by the following language from the Court’s opinion:

“It may be observed that the Treasury Department has held that emblems designed to be attached to automobiles to show membership in automobile clubs, societies, etc., *are not taxable as automobile accessories*, S. T. 409, II-1, C B 285.”

The above statement has no relation whatever to the Third Circuit's alleged "preoccupation" with the 1941 Amendment to Section 316.55 of Treasury Regulation 46. Under the reasoning of *Smith v. McDonald, supra*, the electrical taxi signs and emblems are advertising devices. The dealer frames are in the same category and are accessory to the dealer's business and not to the automobile. (App. Op. Br. pp. 16-18.)

With respect to *Cuno Engineering Corp. v. United States, supra*, appellee argues that the cigar lighters and ash receivers are not primarily adapted for use on motor vehicles and attempts to distinguish the case on that basis. (Br. p. 18.) The case may not be disposed of in such summary fashion. In a well reasoned opinion (App. Op. Br. pp. 10-11), the Court clearly and unequivocally distinguished between *extraneous articles* attached to automobiles, such as license frames, "and ones so intimately connected with its safe operation and functioning elements that it becomes a component part of the machine's utility." The Court further stated:

"Aside from the general commercial value of the devices here involved, it is difficult to see how they, in any wise, prolong the life of a car, aid in its operation or function to overcome any of the various difficulties dependent upon the car's operation, or the incidental inconveniences of automotive travel."

The whole basis of the Court's opinion was that an article, to be an *accessory*, must serve some operational and functional need of an automobile and be related to the machine's utility.

Moreover, in the *Cuno Engineering* case, the Court said:

"The installation of a cigar lighter and ash receiver is manifestly a convenience to *smokers occupy*

ing an automobile. It may or may not add to the ornamentation of a car. This is a matter of taste. The defendant asserts that Congress meant to tax articles used on or in connection with automobiles. If so the taxing statute has not been so construed." (Emphasis supplied.)

Obviously, the case, when properly analyzed, supports our position herein and confirms our understanding of the rule announced in *Universal Battery Co. v. United States*, *supra*, as to what constitutes an automobile "accessory."

IV.

Automobile Dealer Frames Represent the Sale of Labor and Material and Are Not Sales of Dealer Frames as Automobile "Accessories."

Appellant, in its opening brief, cited two cases in support of the theory that dealer frames represent the sale of labor and material, namely, *Johnny and Mack, Inc.*, D. C. Fla. (1954), 123 Fed. Supp. 400, and *Bacon and Van Buskirk Glass Co. v. Luckenbill* (D. C. Illinois, 1955), 55-1, U. S. T. C. para. 49, 124, C. C. H. 1956, Vol. 5, page 51, 102. (Br. pp. 19-20.) These cases hold that the manufacture and sale of seat covers and automobile windshields represent the sale of labor and material and may not be taxed as automobile "accessories."

Appellant also pointed out in its opening brief that *Masao Hirasuna v. McKenney* (D. C. Hawaii, 1955), 135 Fed. Supp. 897 (now on appeal to this Court), asserted a contrary view. In this case, seat covers were held to be an accessory within the meaning of Section 3403(c) and the applicable regulations.

In a recent case, *H. H. Keeton, Sr., trading and doing business as Virginia Auto Top Company v. United States* (April 24, 1956), 1956 C. C. H. para. 9487, p. 55,291, involving seat covers, District Judge Hutcheson, commenting on the *Hirasuna* case, stated: "I am unable to accept the reasoning of the learned Judge in this respect" and followed the reasoning of *Bacon and Van Buskirk* and *Cotter v. Luckenbill* cases, *supra*. The District Court then stated that:

"The United States District Court of Connecticut in 1926 decided the case of *John J. Roche Co. v. Eaton*, 14 Fed. (2d) 857. The facts in that case were essentially on all fours with the case at bar except that the plaintiff in the Roche case performed auto repairs *in addition to custom slip covers*. The Internal Revenue Service has undertaken to distinguish the Roche case from the type of case at bar. However, I think they are undistinguishable and that the conclusions in the Roche case are sound. In the Roche case the Court uses language appropriate to the instant case:

"I hold that the dominant aspect of the transactions engaged in by the plaintiff was that of work performed. Materials were, of course, supplied; but the fact that these materials were not manufactured *en masse*, *but were fashioned specially in each instance for a specific customer, makes the furnishing of them but an incident of the major transaction*.

"In view of the foregoing reasoning, I hold that the work done by plaintiff does not come within the meaning of Section 2403(c), *supra*, and consequently plaintiff is not a manufacturer of auto accessories within the meaning of the statute." (Emphasis supplied.)

Admittedly, the above cases express sharply opposing views with respect to whether or not seat covers and glass for windshields on automobiles represent the sale of labor and material rather than "accessories". The ratio of these decisions, however, is four to one in favor of the taxpayers.

In the present case, the dealer frames were not manufactured en masse and carried in stock for sale to any person or persons, but were fashioned specifically in each instance for specific auto dealers. They are cut from large metal sheets and are not carried in stock and sold over the counter to customers in the normal course of business. In this respect, dealer frames are analogous to the factual situation in *Johnnie and Mack, Inc.*; *Bacon and Van Buskirk Glass Co.*; *H. H. Keeton, Sr.* and *John J. Roche* cases, above mentioned.

Conclusion.

For the foregoing reasons, the decision entered below should be reversed.

Respectfully submitted,

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